

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SECOND APPEAL No. 176 of 1984**

with

SECOND APPEAL NO. 197 OF 1984**For Approval and Signature:****HONOURABLE MR.JUSTICE A.L.DAVE**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge ?
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AMBALAL GOKALBHAI PATEL - Appellant(s)**Versus****JASHBHAI M PATEL & 2 - Defendant(s)**

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Appearance :**SA 176 OF 1984**

MR UDAYAN VYAS FOR MR BHARAT J SHELAT for Appellant(s) : 1,
MR SURESH M SHAH for Defendant(s) : 1,
MR NALIN K THAKKER for Defendant(s) : 2,
MR GIRISH D BHATT for Defendant(s) : 3,

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MR NK THAKKAR FOR APPELLANT
MR SURESH M SHAH for Defendant(s) : 1,
MR UDAYAN VYAS FOR MR BHARAT J SHELAT FOR RESPONDENT NO.2 & 3

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE**Date : 29/09/2005****ORAL JUDGMENT**

1. These two appeals are preferred by original defendant Nos.1 and 2 in Regular Civil Suit No.456 of

1978 in Court of Civil Judge (J.D.), Anand. Defendant No.3 - Anand Nagarpalika has not preferred any Second Appeal. The dispute between the parties is in respect of easementary rights claimed to be enjoyed by the appellants over the land of the respondent. The said easementary right of way crystallized when a compromise decree was passed in Regular Civil Suit No.226 of 1944, whereby it was agreed between the parties that a strip of land of width of 7 ft. falling on the northern side of the respondent's property would be kept open to enable the appellants to go to their own property, but the right was restricted to right of way only and did not include right to take bullock cart through the said strip of land. It was also agreed between the parties that the respondent would be entitled to construct a terrace, but not a construction which may obstruct the enjoyment of the said easementary right of way.

2. While admitting these appeals, following substantial question of law was formulated :

(i) Whether the Lower Courts have erred in construing the consent decree passed in Regular Civil Suit No.226 of 1944, Exh.73,

and have erred in reading the Map, Exh.74 ?

3. Learned Advocate Mr.Udayan Vyas for learned Senior Advocate Mr.B.J.Shelat for the appellant in SA No.176 of 1984 and Mr.N.K.Thakkar for the appellant in SA No.197 of 1984 are heard, so also learned Advocate Mr.S.M.Shah and Mr.G.D.Bhatt for the respondents are heard.

4. In order that the contentions raised before this Court can be properly appreciated, certain facts need to be stated :

4.1 The parties are neighbours and they had a dispute in respect of right of way way-back in 1944 and Regular Civil Suit No.226 of 1944 came to be instituted in the Court of learned Civil Judge (J.D.), Anand. It transpires that wisdom prevailed amongst the parties and the said suit came to be disposed of in terms of settlement arrived at between the parties. The said settlement decree is produced on record of the present suit as well. It is clear from the decree that said suit was preferred by one Maganbhai Kishorbhai Patel (Patidar) against Gokalbhai Shivabhai and Chaturbhai Babarbhai. The

plaintiff therein was predecessor-in-title of the plaintiff – respondent herein and the defendants therein were the appellants herein through their predecessor. The dispute was regarding right of way and it was agreed that the plaintiff will keep the passage open to extent of 7 ft. immediately after the northern wall for all time to come. It was left open for the plaintiff to make construction of terrace on the northern side. The plaintiff will have no right to make any construction on the land open for the passage. The passage is not to be used for ingress and egress of bullock carts. It was also agreed that the plaintiff may use his remaining land after leaving open the 7 ft. wide strip of land. This compromise decree was passed on 18th October, 1947. The present suit came to be filed by the respondent for declaration that defendant No.2 has no right to lay drainage pipeline through the land of the ownership of the plaintiff as described in the plaint and for a direction upon defendant No.2 to remove the pipeline which is already laid unauthorizedly. Further injunction against defendant Nos.1 and 2 against causing any obstruction in the plaintiff making construction on his property after leaving open 7ft. wide passage.

4.2 The Trial Court, after considering the evidence on record, dismissed the plaintiff's suit. The plaintiff, therefore, approached the first appellate Court viz. District Court, Nadiad and by the impugned judgment and decree, the first appellate Court partly allowed the appeal setting aside the decree of the Trial Court dismissing the suit. The first appellate Court took into consideration the compromise settlement decree passed between the parties in the year 1947. The first appellate Court also considered the evidence evaluated it afresh and ordered that defendant No.2 has a right to lay the drainage channel under- the plaintiff's land and confirmed finding of the Trial Court to that extent. The first appellate Court ordered that so far as plaintiff's right to construct a wall is concerned, the order of the Trial Court stood quashed and it was held that the plaintiff has a right to construct a wall keeping 3 ft. strip of land down open from point 'X' in west of point 'X' and that strip of land of 3 ft. width through out north-south to be kept open from point 'X' in the Map Exh.74 and hence, theses appeals.

5. Learned Advocate Mr.Udayan Vyas and Mr.Thakkar have taken this Court through the R & P. Their case is

that since the plaintiff has not preferred any appeal, the dispute regarding laying of pipeline beneath the surface of land in question attains finality against the respondent - plaintiff. But, so far as the construction part is concerned, it would obstruct right of passage available to the appellant by virtue of decree passed in the year 1947. It would also prejudice the easementary right of the appellants in form of right to light and air. They submitted that the first appellate Court committed an error in interpreting the decree passed in Regular Civil Suit No.226 of 1944 (Exh.73) and in reading Map Exh.74. Both the learned Advocates endeavored to give a particular interpretation to the decree of 1947 passed on basis of the settlement purshish.

6. Learned Advocate Mr.Bhatt for the respondent No.3 Nagarpalika submitted that Nagarpalika is a formal party. According to him, no substantial question of law arises for determination by this Court.

7. Learned Advocate Mr.Shah for the respondent No.1 submitted that there is no substantial question of law that may call for determination by this Court. He submitted that interpretation of a decree which was

forming part of the record as a piece of evidence would be re-evaluating the evidence on factual aspects. He also submitted that same would be the situation so far as the Map Exh.74 is concerned and, therefore, this Court may not exercise appellate jurisdiction under Section 100 of the Code of Civil Procedure.

8. This Court has taken into consideration all the relevant aspects.

9. It may be noted that there is no dispute on the appellants having an easementary right of way. That right came to be crystallized by decree in the year 1947 and defendant is honouring that right. So far as other property is concerned, the decree has kept it open to the plaintiff to make use of it in a manner which would not obstruct the right of way of the appellant and that very aspect is considered by the first appellate Court. Even if there is an error with regard to Exh.74 map, it would be an error of fact and first appellate Court is the final Court so far as the factual findings are concerned. Learned Advocates for the appellants could not indicate any substantial question of law that may call for determination by this Court while exercising powers under

Section 100 of the Code of Civil Procedure. In this fact situation, this Court is of the view that power under Section 100 of the Code of Civil Procedure cannot be exercised. Second Appeal cannot be entertained on basis of submission on factual findings of the Court below. The appeals, therefore, must fail and stand dismissed. R & P to be send back. No costs.

(A.L.DAVE, J.)

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